

EDMUND G. BROWN JR.
Attorney General of the State of California
DANE R. GILLETTE
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
PEGGY S. RUFFRA
Supervising Deputy Attorney General
MICHELE J. SWANSON, State Bar No. 191193
Deputy Attorney General
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5703
Fax: (415) 703-1234
Email: Michele.Swanson@doj.ca.gov

Attorneys for Respondent

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

MICHAEL J. WOODCOCK,

Petitioner,

v.

BEN CURRY, Warden,

Respondent.

C 07-3043 WHA (PR)

**REPLY TO OPPOSITION TO
MOTION TO DISMISS
PETITION FOR WRIT OF
HABEAS CORPUS AS
UNTIMELY**

On November 2, 2007, respondent filed a motion to dismiss the petition for writ of habeas corpus as untimely. On December 31, 2007, petitioner filed an opposition to respondent's motion. While petitioner admits that his petition was not filed within one year of his conviction becoming final, he argues that the merits of his petition should nonetheless be heard by the Court because he is "actually innocent" of the great bodily injury allegation under Penal Code section 1203(e)(3). Alternatively, petitioner argues that his petition is timely under 28 U.S.C. 2244(d)(1), because the statute of limitations did not begin to run until the date a state court decision clarified the law regarding section 1203(e)(3). The following is our response.

Reply to Opp. to Mot. to Dismiss Pet. for Writ of Hab. Corpus as Untimely

Woodcock v. Curry, Warden
C 07-3043 WHA (PR)

ARGUMENT

I.

PETITIONER HAS NOT SATISFIED HIS BURDEN OF PROVING ACTUAL INNOCENCE

As noted in our motion to dismiss, a jury found petitioner guilty of assault by means of force likely to produce great bodily injury within the meaning of Penal Code section 245(a)(1), and found true allegations that petitioner personally inflicted great bodily injury within the meaning of Penal Code sections 12022.7(a) and 1203(e)(3). Citing *Schlup v. Delo*, 513 U.S. 298, 327 (1995), petitioner contends that the AEDPA's statute of limitations should not apply to him because of he is "actually innocent" of the great bodily injury allegation under Penal Code section 1203(e)(3). Opp. at 2.

The Supreme Court has not decided whether there is an actual innocence exception to the AEDPA's statute of limitations. In *Majoy v. Roe*, 296 F.3d 770, 776 (9th Cir. 2002), the Ninth Circuit noted without deciding that a sufficient showing of actual innocence might override the statute of limitations. The court held that, if such an exception exists, a petitioner must establish that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Id.* (quoting *Schlup*, 513 U.S. at 327). "To be credible, such a claim requires petitioner to support his allegations of constitutional error with new reliable evidence - whether it be exculpatory scientific evidence, trustworthy eyewitness accounts, or critical physical evidence - that was not presented at trial." *Schlup*, 513 U.S. at 324. Further, "actual innocence" means factual innocence, not mere legal insufficiency." *Bousley v. United States*, 523 U.S. 614, 623 (1998). The Ninth Circuit has interpreted *Schlup* to mean that even if the evidence is not newly discovered, it must be newly presented, i.e., evidence that was not introduced to the jury at trial. *Griffin v. Johnson*, 350 F.3d 956, 961-963 (9th Cir. 2003).

Petitioner has not presented any new evidence of his actual innocence. Rather, he merely cites the decision in *People v. Lewis*, 120 Cal. App. 4th 837, 853 (2004), in support of his claim. Opp. at 3. *Lewis* held that "willfulness" is an element of Penal Code section 1203(e)(3), but not of Penal Code section 12022.7(a). *Lewis*, 120 Cal. App. 4th at 853. Petitioner argues that the trial

1 court's instruction to the jury in his case—that the elements of section 1203(e)(3) were the same as
 2 those of section 12022.7(a)—was therefore erroneous. Petitioner contends that if the jury would
 3 have been properly instructed as to the willfulness element of section 1203(e)(3), it would have
 4 found the allegation not true because the prosecution did not argue that petitioner “willfully”
 5 inflicted great bodily injury. Petitioner asserts that he is thus actually innocent of the allegation, and
 6 that his failure to comply with the AEDPA’s statute of limitations should accordingly be excused.

7 In order to show actual innocence, however, a petitioner must present new, factual
 8 evidence in support of his claim. A new principle of law, legal insufficiency, or the lack of
 9 argument by a prosecutor does not meet this definition. Accordingly, assuming *arguendo* that there
 10 is an actual innocence exception to the statute of limitations, petitioner has failed to meet the high
 11 standard required to override the statute. The petition should therefore be dismissed for failure to
 12 comply with the AEDPA’s statute of limitations.

14 II.

15 **PETITIONER HAS FAILED TO ESTABLISH THAT THE STATUTE OF** 16 **LIMITATIONS SHOULD RUN FROM THE DATE *LEWIS* WAS** **DECIDED**

17 Alternatively, petitioner argues that the AEDPA’s statute of limitations did not begin to
 18 run until the date *Lewis* was decided, making the instant petition timely. Petitioner asserts that *Lewis*
 19 addressed a claim ““so novel that its legal basis [was] not reasonably available to counsel.”” Opp.
 20 at 5. For this reason, petitioner contends, the legal principle set forth in *Lewis* constitutes the
 21 "factual predicate" of his claim within the meaning of 28 U.S.C. § 2244(d)(1)(D).

22 As we noted in our motion to dismiss, however, the Ninth Circuit has previously rejected
 23 an identical argument in *Shannon v. Newland*, 410 F.3d 1083 (9th Cir. 2005). The court noted that
 24 “[i]f a change in (or clarification of) state law, by a state court, in a case in which [the petitioner]
 25 was not a party, could qualify as a ‘factual predicate,’ then the term ‘factual’ would be meaningless.”
 26 *Id.* at 1088. Thus, under the authority of *Shannon*, petitioner is not entitled to calculate the
 27 AEDPA's one-year statute of limitations from the date *Lewis* was decided. The petition should
 28 accordingly be dismissed as untimely.

CONCLUSION

Accordingly, respondent respectfully requests that the petition be dismissed with prejudice.

Dated: January 10, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

DANE R. GILLETTE
Chief Assistant Attorney General

GERALD A. ENGLER
Senior Assistant Attorney General

PEGGY S. RUFFRA
Supervising Deputy Attorney General

/s/ Michele J. Swanson
MICHELE J. SWANSON
Deputy Attorney General
Attorneys for Respondent

40203118.wpd
SF2007401656